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Supreme Court of the United States.

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Original, No. 11.

EX PARTE ELVERTON R. CHAPMAN, PETITIONER.

Brief for Petitioner in Reply to Brief of United States.

J. M. WILSON,
A. J. DITTENHOEFER,
Of Counsel.

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I.

No answer is made in the brief of the Solicitor General to the first point in our brief, namely, that the act of Congress on which the indictment is based and conviction was had is unconstitutional for the reason that it compels a witness to answer though the answer may tend to disgrace or render him infamous.

II.

In attempting to answer the objection that the law is also unconstitutional for the reason that a witness may be compelled to answer questions upon *any* matter under inquiry before any committee of either House, the learned counsel for the Government has ignored the decision of this Court

in *United States vs. Reese* (92 U. S., 214), which is exactly in point.

In that case an inspector of a municipal election was indicted for refusing to receive and count the vote of a citizen of African descent, under sections 3 and 4 of the act of May 31, 1870. The power of Congress to legislate on the said subject rests on the fifteenth amendment, which provides that no person shall be refused the right to vote on account of race, color, or previous condition of servitude; but, because the said act prevented citizens of other than African descent from voting, it was held to be unconstitutional, the Court saying:

"We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is a general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be so limited by judicial construction as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall altogether; the language is plain. There is no room for construction unless it be as to the effect of the Constitution. The question, then, to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific when as expressed it is general only. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would to some extent substitute the judicial for the legislative department of the Government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere Congress is supreme and beyond the control of the courts, but

if it steps outside of its constitutional limitations and attempts that which is beyond its reach the courts are authorized to and, when called upon in due course of legal proceedings, must annul its encroachments upon the reserve power of the States and the people. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

Congress, under the fifteenth amendment, had the undoubted right to legislate for the protection of citizens of African descent, but because the law by its plain language also applied to other persons it was set aside as unconstitutional.

So here, Congress has the right to compel a witness to answer questions "upon any matter" concerning which it has the constitutional right to make inquiry; but as the law also compels a witness to answer questions "upon any matter" concerning which it has no right to make inquiry it falls within the denunciation of the Reese case.

In that case the Court held unequivocally that words of limitation cannot be inserted in a penal statute for the purpose of upholding its constitutionality.

The same doctrine is laid down in the Trans-Missouri Freight Association case, just decided by this Court. The Court in that case held that the words "in restraint of trade," in the penal statute there under review, cannot by judicial construction be limited to apply only to such combinations as are in *unreasonable* restraint of trade, but must be taken, as the language implies, to include *every* combination in restraint of trade, whether reasonable or unreasonable, saying among other things:

"By the simple use of the term contract in restraint of trade all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in re-

straint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

As this Court in that case construed the word "every" and refused to limit in any way its application, so the counsel for petitioner in the present case contend the word "any" should receive its literal meaning and not be limited, as the counsel for the defendant contends it should be, and if it receives its literal meaning section 102 must be held to be unconstitutional, as it compels a person to answer any question without reference to the purpose of the investigation.

It is useless with these decisions covering the said point so completely to follow the discussion in the brief of the learned Solicitor General as to the dictionary meaning of the word "any," or the cases cited by him that are not analogous.

But another answer to these cases cited by the Solicitor General is found in the fact that the act, embraced in sections 101, 102, 103, and 104, Revised Statutes of the United States, does not leave the Court free to *exclude* such things as may be beyond the power of Congress to *include*, because the act of Congress expressly *includes* them and leaves no room for this Court to eliminate them by *construction*, for the act requires the witness to answer, even though his answer may tend to disgrace him or render him infamous.

The act expressly includes the requirement to answer, whether the answer tends to disgrace the witness or render him infamous, which is clearly unconstitutional, and the Court cannot by construction exclude this in order to limit the operations of the act to such things as the Constitution would permit.

III.

The learned counsel for the Government seems to have entirely misconceived the questions involved in our objection that the law is unconstitutional, on the ground that it divests the respective Houses of Congress of their authority to punish for contempt.

Section 104 of the Revised Statutes provides that WHENEVER a witness is summoned and fails to testify, the facts are to be reported to either House, and THEREUPON the President or the Speaker SHALL certify to the district attorney in order to bring the matter before the grand jury for its action. It will be noticed that no action is required by the Senate or by the House, and that no discretion whatever is left in the President or Speaker, but that they must certify to the district attorney.

The certificate is to be sent immediately to the district attorney, and it can be done without notice to or the knowledge of the Senate or House, as the case may be. An indictment could thereupon be found at once, the trial railroaded, and sentence of imprisonment imposed. If, after this, the Senate desired to exercise its constitutional right to punish for contempt, it would be impossible to do so, for the reason that the party, being in prison, could not be brought before it. It is no answer to say that after he has served his sentence he could be brought before the Senate, for that would be placing him twice in jeopardy and inflicting double punishment.

The Senate being a continuous body, what is to prevent a resolution being passed tomorrow that the questions put to Mr. Chapman were not pertinent, that he was not in default, and directing the President to recall his certificate? Such an order would be useless, since Mr. Chapman has been tried and convicted. For these reasons, the argument

that Chapman has really not been tried or convicted for the offense of contempt of the Senate need not be considered.

It is true that the act under which Chapman was tried and convicted is entitled "An act more effectually to enforce the attendance of witnesses on the summons of either House of Congress and to compel them to discover testimony," but if one be asked to define what a subpœna issued by a court is the answer would be the same—that it is an act of the court to enforce the attendance of a witness and to compel him to testify. The transaction for which Chapman was tried was his refusal to answer a question of the committee, which is, if anything, a contempt of the Senate.

IV.

The Solicitor General contends that "the subject-matter of the inquiry with which the committee of the Senate was charged was within the jurisdiction of that body." That, however, is not the point of our objection. The right of the Senate to put proper and pertinent inquiries to a witness in aid of its judicial powers, and it may be its legislative powers, may be conceded.

The point made by us is that the committee was without power to make any inquiry, for the reason that the resolutions do not show, on their face, that the inquiry was prosecuted for any such purpose.

The Senate being a body of limited jurisdiction, no presumption that it has jurisdiction can be indulged in, but the facts showing jurisdiction must affirmatively appear. Instead of this, the idea that the inquiries put to Mr. Chapman were for any purpose within the jurisdiction of the Senate is negatived by the fact that no charge "alleging that the action of any Senator has been corruptly or improperly influenced in the consideration of said bill, or that any attempt has been made to influence legislation," was filed, which the last resolution provided might be done. On the

contrary, in respect of the inquiry put to Mr. Chapman, no report by the committee was called for by the resolution.

The resolutions show no more, on their face, jurisdiction in the Senate to put the question than did the resolutions in the *Kilbourn* case, which were condemned.

The case of the *People ex rel. vs. Keeler* (99 N. Y.), on which the Solicitor General dwells, is criticized and distinguished in our main brief. It is the only case that could possibly be cited by him and is in direct conflict with the uninterrupted current of decisions.

V.

THE POINT WAS MADE ON THE ORAL ARGUMENT THAT CHAPMAN WAS DENIED THE RIGHT OF TRIAL BY JURY.

In a criminal case the court cannot direct a verdict of guilty for the plain reason that that would be substituting the will of the court for the judgment of the jury, in violation of the Constitution, which gives to every person the right to a trial by a jury. Had there been in this case an unequivocal direction to convict, no argument would be needed to set aside the verdict as illegal and in defiance of the Constitution; but if this is accomplished by indirection it is just as illegal.

The record which is brought up on this application, not under the statutory *certiorari*, but under the common law ancillary *certiorari*, discloses that the only question the court submitted to the jury was whether the questions put to Chapman on the witness stand were the questions set forth in the indictment and whether he refused to answer them.

At folio 110 of the Record in the Court of Appeals in the District of Columbia it appears that the trial court charged as follows:

"On behalf of the Government I have granted an instruction which submits to you in proper language, I think,

the questions to be disposed of by you, and I will now read it to you for your guidance: 'If the jury find from the evidence, beyond a reasonable doubt, that the defendant, Elverton R. Chapman, was summoned as a witness to testify before the committee of the Senate appointed under a resolution of the Senate of May 17, 1894, recited in the indictment and given in evidence, and that he appeared before said committee in the District of Columbia and was there sworn as a witness, and that during his examination as such witness there were propounded to him any of the questions recited in the indictment as having been propounded to him, and that he refused to answer said questions or any and responded thereto in the manner set out in the indictment, then the jury are instructed that they should find the defendant guilty as indicted.'"

As it was admitted that Chapman was summoned as a witness; that he appeared before the committee, was sworn as a witness, and refused to answer, the only question that was actually submitted to the jury was whether "any of the questions recited in the indictment as having been propounded to him" "were propounded to him." After the jury had been out over twenty-four hours, they returned and put the following question to the court:

"Is the admission by the defendant that the questions as set forth in the indictment were substantially the same equivalent to an admission by him that they were the same, and can the jury act upon that hypothesis?"

To which the court answered as follows:

"I answer that in the affirmative. If you find from the evidence that the defendant himself upon the stand admitted that the questions put to him, and which he declined to answer before the committee, were substantially the same as those set forth in the indictment, that is sufficient to prove that they are the same."

It came, then, to this: That in one breath the court told the jury that they must convict if they found the questions

were the same, and, in the next breath, that the questions were the same. Suppose the court had in the first instance said, "Gentlemen of the jury, the questions put to Mr. Chapman on the stand are the same questions mentioned in the indictment, and I charge you that you must convict if you find that they are the same," would that not have been a direction to convict?

It may be asked what was the court to do; simply to say, "Gentlemen, you have heard the evidence, and it is for you to find whether the questions are the same. To answer your question would amount to a direction to convict, which I have no right under the Constitution to give."

The questions that arise on the application for the statutory writ of *certiorari* it is unnecessary and improper to discuss on this application for the writ of *habeas corpus* and ancillary *certiorari*, but it may be proper to call the Court's attention to the fact that a number of indictments under the same law are still pending in this Court against Messrs. Havermeyer, Searle, Macartney, Schriver, and Edwards, involving the same questions. It is, therefore, respectfully submitted that the writ of *certiorari* ought to be allowed under the recent act, in order to have the final decision of the highest court of the land on the questions that will arise in those other cases, and more particularly as to the meaning and office of the word "willfully" in said act.

J. M. WILSON,
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Of Counsel.